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In The

SUPREME COURT OF THE UNITED STATES

October Term 1962

Case No. 717

LYNCHBURG TRAFFIC BUREAU (Corp.),
Petitioner,

v.

SMITH'S TRANSFER CORPORATION
OF STAUNTON, VA.,
Respondent.

PETITION OF LYNCHBURG TRAFFIC BUREAU FOR WRIT OF CERTIORARI

AND APPENDIX

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STATEMENT

Comes now petitioner, the Lynchburg Traffic Bureau, and seeks a review of the judgment of the Court of Appeals for the Fourth Circuit, which judgment affirmed a judgment of the District Court for the Western District of Virginia. The judgment of the District Court was to the effect that:

> "I conclude that the facts of this case bring it squarely within the armpit of the decision of the Supreme Court in the case of T.I.M.E., Inc. v. U. S., 359 U. S. 464."

The decision of the District Court and the decision of the Court of Appeals were rendered before this Honorable Court, on November 19, 1962, rendered its decision in Hewitt-Robins, Inc. v. Eastern Freightways and its decision in Case No. 222, Pensick & Gordon, Inc. v. California Motor Express, et al, decided December 3, 1962. Petitioner believes that the judgment of the District Court and that of the Court of Appeals would have been for petitioner had the decision of this Honorable Court in Hewitt-Robins, Inc. v. Eastern Freightways supra been rendered prior to the time the District Court and the Court of Appeals rendered their decisions in this action.

THE OPINION

The opinion of the District Court appears at pages 18-25 and the opinion of the Court of Appeals appears at pages 15-17 hereto.

JURISDICTION INVOKED

The judgment of the Court of Appeals was rendered and entered on November 5, 1962 and the judgment of the District Court was rendered and entered on the 5th day of March 1962.

The statutory provision for review by the Court is found in 28 U.S.C. 1254 (1) and the jurisdiction of the District Court in 28 U.S.C. 1337 and of the Court of Appeals, 28 U.S.C. 1291.

QUESTIONS

The questions presented are:

(1) Does the Motor Carrier Act provide any remedy for a shipper against a certified common carrier by motor vehicle:

(a) for failing to comply with an order of the Interstate Commerce Commission, and

(b) making a charge for transportation which charge the Interstate Commerce Commission found to be unjust and unreasonable prior to the time the shipment moved; and

(2) Can a shipper, under the Motor Carrier Act, recover damage from a certified common carrier by motor vehicle for charging higher rates and charges than those the Interstate Commerce Commission found, prior to movement of the shipments, to be just and reasonable.

STATUTES

The statutes involved are: Section 205(g) of the Act, 49 U.S.C. 305(g), which provides that petitioner has a statutory right of relief in Court against respondent for enforcement of an order of the Interstate Commerce Commission; Section 16(12) of the Act, 49 U.S.C. 16(12) provides that petitioner may (as it did) apply to any district court of competent jurisdiction for enforcement of the order of the Interstate Commerce Commission entered on July 27, 1951 in Docket MC-C-1019 (tr. 23-24) and that the Court shall enforce obedience; Section 8 of the Act, 49 U.S.C. 8, provides that petitioner can collect from respondent full damage for respondent's disobedience to an order of the Interstate Commerce Commission; Section 219 of the Act, 49 U.S.C. 219, makes respondent sub-

ject to Section 20(11) of the Act, 49 U.S.C. 20(11), and Section 20(11) of the Act prohibits respondent from making any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt or bill of lading, or any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission and declares the valuation charge respondent collected from petitioner, even though published in a tariff, to be unlawful and void unless the limitation of value has been expressly authorized or required by an order of the Interstate Commerce Commission; and Section 216(d) of the Act, 49 U.S.C. 316(d), provides that all charges shall be just and reasonable and pursuant all charges shall be just and reasonable.

THE FACTS

Beginning in July 1953 and continuing until 1960, petitioner received, via Smith's Transfer Corporation at Lynchburg, from New York, N. Y., numerous shipments of freight, including such articles as clothing and dry goods. The respondent, by tariff provision, required petitioner to declare the value on shipments of clothing and dry goods, by limiting the liability of respondent in case of loss, damage or injury to the said clothing and dry goods. Petitioner did release the value and paid to respondent a charge therefor equivalent to 20 cents per 100 pounds. This charge is prohibited by Section 20(11) of the Act, 49 U.S.C. 20(11) unless specifically authorized by the Interstate Commerce Commission. The record shows, by Plaintiff's Exhibit F, (tr. of record 25-27) that the Commission granted respondent relief in 1941 from the provisions of Section 20(11) of the Act and conditioned that relief or limited its use by requiring respondent to incorporate in its tariff the following provision:

"Charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. MC-208 of May 21, 1941, subject to *complaint* or suspension" (tr. 25 thru 27). (Emphasis supplied)

The usefulness and validity of Released Rate Order No. MC-208 by its own terms and those published in a tariff, are subject to complaint and when a complaint was filed on January 13, 1949 in Docket MC-C-1019, the released rates order became ineffective.

The valuation charge assessed against petitioner was declared, under 49 U. S. C. 316(d), unlawful in 1951 by the Commission in the complaint case, Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157 (158 and 173), Exhibit 4 in the District Court, yet respondent has forced petitioner to pay that unlawful charge and has resisted this action. The Commission not only found the valuation charge unjust and unreasonable but entered an order on July 27, 1951 requiring the cancellation of the tariff provisions containing the valuation charge. This order was reproduced and introduced in evidence in the District Court as Plaintiff's Exhibit E (Tr. of record, pp. 23, 24). The exaction of those charges on the shipments included in this action is positive proof that the cancellation was not made by respondent as ordered. Consequently, the valuation charges were exacted from petitioner in violation of an order of the Interstate Commerce Commission and contrary to a finding of the Interstate Commerce Commission that the valuation charges, on July 27, 1951, were then and would be for the future, unjust and unreasonable. Furthermore, the valuation charge

has been exacted without specific authority from the Interstate Commerce Commission as required by Section 20(11) of the Act, 49 U.S.C. 20(11). The valuation charge being ordered canceled in 1951, has the effect of withdrawing the approval the Commission gave in 1941 and makes respondent's collection of the valuation charge a direct violation of 49 U. S. C. 20(11) to which section respondent is made subject by 49 U. S. C. 319.

There is a second issue in this action and that is, that respondent charged higher rates and charges from New York, N. Y. to Lynchburg than respondent maintains from White Plains, N. Y. through New York and Lynchburg to Gretna, Virginia. The Commission has held in several cases that higher rates and charges at intermediate points than to more distant points are prima facie unjust and unreasonable and admonished the respondents in 1949 and again in 1956 to remove the disparities in rates, which the respondent has not done (see 67 M.C.C. 741 and 49 M.C.C. 357).

FEDERAL JURISDICTION

This cause of action involves an Act of Congress regulating interstate commerce and the district court has original jurisdiction under 28 U. S. C. 1337.

ARGUMENT

In Paragraphs IV and V of Civil Action No. 523 and in Amendment to Civil Action No. 414 (tr. of record 3, 4 and 10), petitioner specifically alleged that respondent had charged a valuation charge on each shipment of cloth-

ing and dry goods and tendered evidence to show that respondent has done so contrary to an order of the Interstate Commerce Commission in Docket MC-C-1019 which order is reproduced as plaintiff's Exhibit E (tr. of record, P.P. 23 and 24) and contrary to the finding of the Interstate Commerce Commission that the valuation charge on and after July 27, 1951 would be unjust and unreasonable and this finding is found at 53 M.C.C. 157(173). The decision and order of the Commission were introduced in evidence at the trial in the District Court.

The District Court held that the T.I.M.E. Case "covers this situation like a blanket" and then said: "This case hasn't actually been heard and tried on the merits."

The Court of Appeals stated (tr. of record 37) that "on examination of the record as a whole, we are convinced that the District Court's findings are amply supported by the evidence and are clearly correct."

The District Court stated that this case hasn't actually been heard and tried on the merits. The record in the District Court contained the decision of the Interstate Commerce Commission in Dry Goods, Piece Goods, Dependent Upon Value, 53 M.C.C. 157, showing the valuation charge to be unjust and unreasonable and that the record before the District Court and the Court of Appeals contained a copy of the order of the Interstate Commerce Commission (tr. of record 23 and 24), requiring the cancellation of the valuation charge and that respondent did not cancel the valuation charge as ordered. These facts of record, petitioner respectfully submits, show: (1) that this case has not actually been heard and tried on the merits; and (2) that this case and the T.I.M.E. Case are different in facts

and a different law applies to each. An actual hearing on the merits will prove that the T.I.M.E. Case does not apply.

In this cause, there are involved important questions of federal law which are: (1) does the Interstate Commerce Act afford any relief to a shipper against a motor common carrier who has collected charges contrary to an order of the Interstate Commerce Commission; (2) does the Interstate Commerce Act give a shipper a right of relief to damage from a motor carrier who has disobeyed an order of the Commission; and (3) can a shipper, under the Motor Carrier Act, recover damage from a motor carrier who has charged rates and charges the Interstate Commerce Commission has found to unjust and unreasonable. This case presents questions of federal law which have not been decided by this Honorable Court but should be settled by this Honorable Court and involves conflict between decisions of this Court and the decisions of the lower courts in this case. There is a conflict in the decision in Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U. S. 246, where this Court, at page 251, said:

> "We hold that the right to a reasonable rate is the rate to the rate which the Commission files or fixes",

and the decision in this case holding that the decision in the T.I.M.E. Case bars petitioner from the benefit of the rate and charges the Commission fixed. The rates or charges the Commission fixed are shown in Dry Goods, Piece Goods, Dependent on Value, reported at 53 M.C.C. 157, at page 173, where the Commission, after considering the lawfulness of the valuation charge on clothing and dry goods, said:

"In No. MC-C-1019, we find that the assailed ratings and provisions are, and, for the future will be, unjust and unreasonable."

Pursuant to that decision, the Interstate Commerce Commission issued the order shown at page 23 of the transcript of record, requiring the cancellation of the valuation charge, the pertinent part of which is:

"It is Ordered, * that the defendants in MC-C-1019 be, and they are hereby notified and required to cancel the assailed ratings and provisions on or before September 10, 1951 *."

This order was not obeyed by respondent and that fact is proven by the decision of the Interstate Commerce Commission in Lynchburg Traffic Bureau v. Smith's Transfer Corp., reported at 310 I.C.C. 503, where, at page 505, the Commission said:

"In Released Rates Order No. MC-239, issued prior to 1951, the conference was authorized to publish, on behalf of its members including Smith, rates and charges dependent on value, on clothing, including dry goods, subject to complaint and suspension. However, in 1951, released ratings and penalty ratings on dry goods, finished or unfinished, except when made wholly of cotton, were considered in Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157. Therein, Division 3 found released ratings and penalty ratings on such traffic moving between points in Middle Atlantic territory and between that territory and New England territory, unjust and unreasonable, *and their cancellation was required.*" (Emphasis supplied).

The decision of the Interstate Commerce Commission further shows, at page 503, the following:

> "Prior to the institution of this proceeding, an action at law seeking damages for the alleged unlawful rates was brought in the United States District Court for the Western District of Virginia. In view of the decision in T.I.M.E., Inc. v. United States, 359 U.S. 464, our determination herein concerning the ratings applied and rates charged on past shipments will be restricted to the issue of applicability."

In these decisions, it is clear that the valuation charge was declared in 1951, to be unjust and unreasonable and its use required to be cancelled in 1951. Therefore, is petitioner entitled to damage from respondent for failing to maintain just and reasonable rates and charges fixed by the Commission and for disobeying an order of the Interstate Commerce Commission by charging petitioner different charges from those the Commission ordered to be charged on shipments of clothing and dry goods? Petitioner believes that there is conflict between the decision of the Court of Appeals in this cause and the decision of the Supreme Court in Hewitt-Robins, Inc. v. Eastern Freightways, 9 L ed 142 and that the conflict can be removed by granting the petition and the relief it seeks. Then, there is conflict between the decision of the lower courts and the provisions of the Interstate Commerce Act.

The decision of the Court of Appeals failed to comment upon the right of petitioner to relief under federal laws and under the findings of the Commission and so did the District Court and, in so doing, has decided a case in conflict with the decisions of this Honorable Court in

Hewitt-Robins, Inc. v. Eastern Freightways, Inc. (decided November 19, 1962), in ..... U. S. ....., 9 L ed 2d 142, 83 S. Ct. ....., and Case No. 222, Pensick & Gordon, Inc. v. California Motor Express, decided on December 3, 1962.

This action is identical in law with the decision of this Court in Hewitt-Robins, Inc. v. Eastern Freightways, 9 L ed 2d 142, decided November 19, 1962. In that case, Hewitt-Robins went to the Interstate Commerce Commission for the purpose of getting the Commission to determine, under the Act, whether or not it was reasonable and lawful for a motor carrier to carry unrouted intrastate shipments on its interstate routes at higher rates than those applicable to its available intrastate routes. The Commission found it unreasonable, under the Motor Carrier Act, 49 U. S. C., Sections 301-307. In the Hewitt-Robins Case supra, this Court, at pages 146 and 147, said:

> "Be this as it may, the survival of a judicial remedy under the saving clause of Section 216(j) cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of regulations. According to Section 216(j) if the remedy is inconsistent with that scheme it does not survive. In T.I.M.E., Inc., we found inconsistencies and hence no judicial remedy survived. Here, as we have indicated, rather than running interference against the Act the exercise of the judicial remedy supports its overall purpose and is in nowise inconsistent with the Congressional scheme embodied within its four corners."

The record in this cause shows that the Commission, in 1951, found the valuation charges which petitioner is seeking to recover on clothing and dry goods to be unjust and unreasonable (see 53 M.C.C. 157, page 173) and issued in the same year (1951) an order directing respondent to cancel the valuation charge. Respondent did not cancel the aforesaid valuation charge, as ordered by the Commission but collected the valuation charge from petitioner during the years 1953 to 1960. The record further shows that in the complaint case (310 I.C.C. 503) of petitioner in 1960, the Commission reaffirmed the fact that the valuation charge on clothing and dry goods was found, in 1951, unjust and unreasonable and its cancellation required and the Commission again, in 1960, found the valuation charge unjust and unreasonable (see Lynchburg Traffic Bureau v. Smith's Transfer Corp., 310 I.C.C. 503).

The facts in this case show that the statutory scheme of regulation governing this case is provided, in addition to 49 U. S. C. 316(j), in Section 305(g), 49 U. S. C. 305(g), in which section petitioner has the same right of relief against respondent as that provided in Part 1 of the Act, 49 U.S.C. 1-26. In 49 U. S. C. 16(12), petitioner has the right to apply to the district court for enforcement of the order the Commission entered on July 27, 1951 (tr. of record 23 and 24) and that the district court shall enforce obedience to such order which obedience neither the district court nor the court of appeals has attempted to enforce, as they held that the T.I.M.E. Case governs. The Act, in our humble opinion, does not support the conclusion of the lower courts because when the district court, under 49 U. S. C. 16(12) enforces obedience to the order of the Commission dated July 27, 1951, a right to damage immediately arises under 49 U. S. C. 8. Thus, this case

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comes squarely within the principle in the Hewitt-Robins Case supra in that it is consistent with the statutory scheme of regulation to grant judicial remedy. The same relief also survives under 49 U. S. C. 316(j).

Wherefore, the failure to grant relief will be inconsistent with the statutory scheme of regulation but to grant relief will be the exercise of the judicial remedy that supports the overall purpose and is in nowise inconsistent with the Congressional scheme embodied within its four corners.

Petitioner respectfully prays that its petition be granted and that oral argument be had or else that the case be remanded to the lower court, as was done in Pensick & Gordon v. California Motor Express supra, for further consideration.

W. G. BURNETTE
Attorney for Petitioner

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Lynchburg, Virginia

January 3, 1962

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Petitioner, hereby certify that I have this 2nd day of January, 1963, served a copy of the foregoing document upon the respondent by mailing a copy thereof to Bryce Rea, Jr., 919 Munsey Building, Washington 4, D. C., counsel for Respondent.

W. G. BURNETTE

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APPENDIX

OPINION
U. S. COURT OF APPEALS

* * *

SOBELOFF, Chief Judge:

This case, which has a rather extensive history, now comes before us on appeal for the third time. Lynchburg Traffic Bureau is a non-profit corporation created to assist shippers and receivers of freight in and near Lynchburg, Virginia, in local pickup, consolidation, movement, and delivery of shipments. The litigation was begun on February 25, 1958, when the Bureau instituted an action in the United States District Court for the Western District of Virginia against Smith's Transfer Corporation of Staunton, Virginia, a common carrier. The complaint recited that the carrier had been charging unreasonable rates and overcharges with full knowledge that the rates collected were unlawful.

After the District Court declined to grant a motion to dismiss, the defendant carrier then brought in this court a petition for mandamus to command the District Judge to dismiss the suit. We denied mandamus on the sole ground that the petition was tantamount to a premature appeal. *Smith's Transfer Corp.* v. *Barksdale,* 259 F.2d 498 (4th Cir. 1958).

Shortly afterwards the United States Supreme Court decided *T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959), holding that a shipper of goods by a certified com-

mon carrier may not challenge in a federal district court the reasonableness of a carrier's past charges made in accordance with the applicable tariffs. Relying upon the *T.I.M.E.* decision, the defendant carrier filed a motion for judgment on the pleadings on the ground that its freight charges were "properly computed at applicable rates duly filed with the Interstate Commerce Commission." The District Court then gave summary judgment for the defendant.

On appeal from this order, we remanded "because of the obscurity of the facts alleged," to afford the plaintiff an opportunity, if so advised, to seek permission from the District Court to file an amended complaint alleging facts which, if they exist, might entitle it to relief. *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 285 F.2d 743 (4th Cir. 1961). Our mandate specifically directed that "Before leave to amend is granted, the District Court should be satisfied by the plaintiff that the amended complaint will allege and the plaintiff intends to prove that the rates actually charged exceed the applicable filed rates; otherwise nothing could be gained by permitting amendment." *Ibid*, 745-46.

In April, 1961, plaintiff filed its amended complaint. In addition, it brought a new and separate action claiming that defendant had similarly charged illegal rates and overcharges in 1958, 1959, and 1960, as in the earlier years, 1953 to the filing of the original action. The two actions were consolidated and tried without a jury on November 22, 1961. From the evidence presented the District Court found that the challenged freight rates paid by the plaintiff had in fact been duly filed with the I.C.C. as the applicable tariffs for the transportation performed by defendant during the period in question. It also appeared beyond question that while the Commission had criticized these past rates and

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had admonished the defendant to voluntarily adopt corrective measures, it did not see fit to cancel those rates until new rates were filed on July 2, 1960—after the transportation of the shipments here in question. Concluding that the *T.I.M.E.* decision governed the issues raised, the District Court held that the plaintiff was entitled to no remedy and accordingly dismissed the consolidated actions. F. Supp. .

From an examination of the record as a whole, we are convinced that the District Court's findings are amply supported by the evidence and are clearly correct. The plaintiff asserted that the defendant exacted from it charges greater than those made for similar transportation between more distant points. However, it was shown at the hearing that additional charges were made for the pickup service on the shipments between those points—charges not imposed on the plaintiff. Thus, it was made affirmatively to appear that the challenged rates from New York to Lynchburg resulted in lower aggregate charges to plaintiff than those cited by it for comparison. Plaintiff's vigorous argument that the *T.I.M.E.* decision is distinguishable is without merit for the reason that the past charges which without merit for the reason that the past charges which are attacked as unreasonable were contained in rate schedules duly filed with the Commission and still remaining undisturbed when the charges were made.

Our conclusion that the plaintiff has failed to carry the burden of proof "that the rates actually charged exceed the applicable filed rates," *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp., supra,* at 746, is dispositive of the case, making it unnecessary to consider plaintiff's other contentions.

Affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG, on the 5th day of March, 1962.

* * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This consolidated action having been tried upon the facts by the court without a jury, the court does hereby find the facts specially and states separately its conclusions of law thereon, and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT.

Plaintiff, Lynchburg Traffic Bureau, is a non-profit corporation created to assist shippers and receivers of freight in and near Lynchburg in local pickup, consolidation of movement and local delivery of shipments. On February 25, 1958, it instituted the first of these two consolidated actions (No. 414) against Smith's Transfer Corporation of Staunton, Virginia, a certificated common carrier by motor vehicle. The complaint charged that the plaintiff had, since June 10, 1953, received at Lynchburg from New York, "numerous less-than-truck-load shipments of various articles via Smith's Transfer Corporation, on which the defendant carrier had charged unlawful, unjust and unreasonable rates in an aggregate overcharge of $3,675.00, with full knowledge that the rates collected were unlawful."

On February 27, 1958, two days after this action was instituted, Smith's Transfer filed a complaint with the

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Interstate Commerce Commission, alleging that the rates charged it by Smith's Transfer, as set out in the complaint, were "unjust, unreasonable and discriminatory", and that, although they were the rates filed with the Commission, they were nevertheless not applicable, and prayed that Smith's Transfer be required to cease and desist from charging these rates, and that the Commission determine, for the past as well as the future, reasonable, just and lawful rates.

Defendant, on April 17, 1958, filed its motion to dismiss the complaint. Relying on *U. S.* v. *T.I.M.E., Inc.*, 252 F. 2d 178, *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, and *U. S.* v. *Davidson*, 259 F. 2d 802, I overruled defendant's motion to dismiss and stayed further proceedings until the Interstate Commerce Commission, in the proceedings before it, should determine what rates were reasonable and applicable to the shipments in controversy. Smith's Transfer then filed its petition in our Court of Appeals for a mandamus to command me to dismiss the suit. Mandamus was denied by the Court of Appeals "on the sole ground that the petition was tantamount to a premature appeal". *Smith's Transfer &c.* v. *Barksdale*, 250 F. 2d 498.

On May 18, 1959, the Supreme Court decided *T.I.M.E., Inc.* v. *U. S.*, 359 U. S. 464, which had been consolidated with *U. S.* v. *Davidson, supra*. In this decision the Supreme Court held that a shipper of goods by a certificated motor carrier may not challenge in a federal court the reasonableness of a carrier's past charges made in accordance with the applicable tariffs. The court decided that the Motor Carrier Act, 49 U.S.C.A., Sec. 301 *et seq.*, did not confer on shippers a statutory cause of action for the recovery of past charges at unreasonable rates, and further that the Act

did not contemplate that shippers should have a common law right to sue for the recovery of unreasonable past rates. The Supreme Court also held that the District Court was not empowered to determine what rates are reasonable for past shipments, nor could it refer that issue to the Interstate Commerce Commission to exercise an auxiliary jurisdiction in aid of a jurisdiction the District Court did not possess.

Having meanwhile filed its answer, on March 18, 1960, defendant filed its motion for summary judgment on the pleadings. After hearing argument and considering the briefs, being of opinion that *T.I.M.E., Inc.* v. *U. S., supra,* which reversed the decisions of the courts of appeal in both *T.I.M.E., Inc., and Davidson,* was controlling, I entered an order on May 11, 1960, granting defendant's motion for summary judgment, and dismissed the plaintiff's action.

On appeal from this order, the Court of Appeals, by Sobeloff, Chief Judge, held that "While on the record before it, the court was correct in ordering dismissal of the proceedings, we will, because of the obscurity of the facts alleged, remand the case to give the plaintiff an opportunity, if so advised, within thirty days, to address an application to the discretion of the District Court for leave to file an amended complaint alleging facts, if they exist, which might entitle it to relief.

"Before leave to amend is granted, the District Court should be satisfied by the plaintiff that the amended complaint will allege, and the plaintiff intends to prove, that the rates actually charged exceed the applicable *filed* rates; otherwise nothing could be gained by permitting amend-

ment." *Lynchburg Traffic Bureau* v. *Smith's Transfer Corporation,* 285 F. 2d 743.

Upon receipt of the mandate of the Court of Appeals, I entered an order accordingly, granting plaintiff thirty days within which to move to amend its complaint, if it should be so advised. Plaintiff moved for leave to amend and tendered its proposed amended complaint. At its request, defendant was allowed time to object in writing, giving its reasons for its objection, to plaintiff's motion for leave to amend. At this point, I left the District for an extended period, and during my absence, Judge Dalton entered an order on April 26, 1961 permitting plaintiff to file its amended complaint. Defendant filed its answer to the amended complaint on May 3, 1961.

On April 5, 1961, Lynchburg Traffic Bureau instituted a new and separate action against Smith's Transfer Corporation (No. 523), the complaint alleging that, during the years 1958, 1959 and 1960, defendant had required it to pay unreasonable and illegal rates on numerous shipments during that period, and demanded a judgment against defendant in the sum of $3,500.00 for the alleged excessive freight charges. Since the second action (No. 523) and the first action (No. 414) involved common questions of law and fact, I entered an order on November 15, 1961, consolidating the two actions under the provisions of Rule 42 (a) F.R.C.P., and the consolidated action came on for trial by the court without a jury on November 22, 1961.

Plaintiff's amended complaint in No. 414 and its complaint in No. 523 allege, and its evidence in support of both complaints shows: (1) that the rates at which defendant performed the transportation for plaintiff from New York,

New York, to Lynchburg, Virginia, were higher than its rates from New York, New York, to points further therefrom than Lynchburg, Virginia; (2) that under defendant's rates its liability for loss or damage to property in transit was limited to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valuation charge, i.e., a premium over the base rates, of 10 cents per hundred pounds or fraction thereof; (3) that the Interstate Commerce Commission had prior to the performance of the transportation in issue expressed the opinion that rates from New York, New York, to Lynchburg, Virginia, higher than rates from New York, New York, to points further therefrom than Lynchburg were improper, and had admonished carriers maintaining such rates to change them; and (4) that the Commission had prior to the performance of the transportation in issue directed the cancellation of tariff provisions similar to those at which defendant performed the transportation in issue in that they limited the carrier's liability for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless the shipper paid a valuation charge of 10 cents per hundred pounds or fraction thereof.

Defendant's evidence shows (1) that the rates at which it calculated the freight charges plaintiff paid *were duly filed with the Interstate Commerce Commission pursuant to Section 217 (a)* of the Interstate Commerce Acts as the applicable rates for the transportation it performed; (2) that the Interstate Commerce Commission had authorized it to file and maintain the tariff provision under which it limited its liability to plaintiff for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valu-

ation charge of 10 cents per hundred pounds or fraction thereof; and (3) that it had in fact filed said provisions and in fact maintained it throughout the period during which it performed the transportation in issue. Defendant was not directed by the Commission to cancel this rate until June 2, 1960, long after the transportation of the shipments here in controversy.

Plaintiff argues vigorously that this case is distinguishable from *T.I.M.E., Inc.* v. *U. S., supra,* on the ground that here, unlike there, the Interstate Commerce Commission condemned as unreasonable the rates and tariff provisions at which the charges were computed before the transportation was performed. But an examination of the reports and orders of the Commission on which plaintiff relies shows no more than that the Commission enunciated therein principles or criteria in establishing rates and tariff provisions. The Commission neither found that the particular rates and tariff provisions at which defendant's charges to plaintiff were calculated were unreasonable nor ordered defendant to cancel them.

For example, in *Increases, Middle Atlantic and New England,* 49 M.C.C. 357 (1948), the Commission noted that existing rates filed with it pursuant to Section 217(a) of the Interstate Commerce Act for transportation beween Baltimore, Maryland, and Lynchburg, Virginia, were higher than the rates for transportation between Baltimore and Danville, Virginia. However, it further noted that such disparities were not unusual at points close to the border between two different ratemaking territories. It therefore did not order the rates between Baltimore and Lynchburg cancelled or changed, but merely told the carriers to take action to eliminate such disparities. Again in *Class Rates Between Middle Atlantic and New England*

Territories, 67 M.C.C. 741, 761 (1956), the Commission noted that the then effective rates between New York, New York, and Lynchburg, Virginia, were higher than those between New York and Gretna, Virginia. But again the Commission refused to order the higher rates cancelled or changed, contenting itself with telling the carriers to take steps to correct such disparities.

Moreover, in its report on plaintiff's complaint against the specific rates in issue here, which complaint is filed simultaneously with and as a necessary concomitant of its suits here, the Commission found that defendant's rates from New York to Lynchburg in fact resulted in lower total charges for such transportation than its total charges for transportation from New York to Gretna or Danville, because the latter transportation, unlike the former, did not include pickup of shipments at New York, for which a separate additional charge was made. Hence, the Commission refused to find defendant's rates from New York to Lynchburg unreasonable and its order did not direct defendant to change them.

As to the provision in its tariffs by which defendant limited its liability, it is true that in 1951 the Interstate Commerce Commission disapproved and issued an order requiring the cancellation of similar provisions. However, that order *did* not require cancellation of the specific provision in defendant's tariff of which plaintiff complains. Defendant was not ordered to cancel that provision until June 2, 1960, when the Commission issued its report and order on the complaint plaintiff filed simultaneously with, and as part of, its effort to effect the recovery it seeks here. In that report the Commission declined to consider the reasonableness of the charges plaintiff had paid defendant

in the past, i.e., the charges it seeks to recover in these suits, on the authority of the Supreme Court's opinion in *T.I.M.E., Inc., supra.* Hence, the order thereon merely directed defendant to cancel the provision in its tariff limiting its liability on or before August 10, 1960. Defendant complied with that order by filing a supplement to its tariff, which cancelled said provision as of August 10, 1960.

CONCLUSIONS OF LAW.

Upon the facts found, I conclude that the charges which plaintiff paid defendant for the shipments here in controversy were computed at the rates and tariff provisions duly filed with the Interstate Commerce Commission under Section 217(a) of the Interstate Commerce Act, and applicable to the transportation of such shipments performed during the periods of time set out in the complaints. While it is true that the Commission subsequently found unreasonable, and ordered cancelled, one of the tariff provisions on which the charges were in part based, and certain other rates had been criticized previously by the Commission, the transportation charges collected by defendant were based upon the rates and tariff provisions duly filed and in force at the time of the shipments here in controversy, and plaintiff was obliged to charge accordingly.

I conclude that the facts of this case bring it squarely within the ambit of the decision of the Supreme Court in the case of *T.I.M.E., Inc.* v. *U.S., supra.* I therefore conclude that plaintiff is not entitled to recover anything of the defendant in this consolidated action, and an order will be entered dismissing it at the cost of the plaintiff.

A. W. BARKSDALE
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 717

LYNCHBURG TRAFFIC BUREAU (CORP.), *Petitioner,*

v.

SMITH'S TRANSFER CORPORATION OF STAUNTON, VIRGINIA, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioner states the questions it presents to be whether the Motor Carrier Act (Interstate Commerce Act, Part II, 49 U.S.C. 301-328) gives a remedy to a shipper against a motor common carrier for failing to comply with an order of the Interstate Commerce Commission directing the cancellation of rates found to be unjustly and unreasonably high and continuing to charge those rates for transportation after such an

order takes effect (Pet. for Cert. p. 3). As we shall show *infra* these questions cannot be before this Court in this case because the District Court found as a fact that Petitioner had failed to carry its burden of proving that Respondent had violated any order of the Interstate Commerce Commission, and further found as facts that the rates and charges Respondent assessed for the transportation it performed for Petitioner had not been found by the Commission to be unjustly or unreasonably high and had not been ordered cancelled, but, on the contrary, were the rates duly filed with the Commission and applicable to the transportation performed when it was performed. This holding and these findings of fact were affirmed by the Court of Appeals. Therefore, the only question reviewable by this Court is whether they are supported by substantial evidence. This is not the type of question which, under Rule 19 of this Court's Rules, justifies the grant of a writ of certiorari.

COUNTER STATEMENT OF THE CASE

Petitioner is a non-profit corporation created to assist shippers and receivers of freight in and near Lynchburg, Virginia in the pickup, consolidation, movement and local delivery of shipments. Respondent is a common carrier of property by motor operating in interstate commerce pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission at rates required to be filed with and regulated by the Interstate Commerce Commission pursuant to Sections 217 and 216 of the Interstate Commerce Act (49 U.S.C. 317, 316). From time to time during the years 1953 to 1959 Respondent transported various commodities for Petitioner's members from New York, New York to Lynchburg, Vir-

ginia. Petitioner filed two suits (Civil Actions No. 414 and 523 in the District Court for the Western District of Virginia) seeking to recover a portion of the charges it paid Respondent for said transportation. The only questions of law and the only disputed questions of fact being common to both suits, they were consolidated by order of the District Court.

The gravamen of the original complaint in No. 414, filed on February 25, 1958, was that the charges Petitioner paid Respondent were computed at rates that were unjust, unreasonable and discriminatory in violation of Section 216 of the Interstate Commerce Act (49 U.S.C. 316). Simultaneously with the filing of said complaint Petitioner filed a complaint with the Interstate Commerce Commission praying it, *inter alia,* to declare said rates "inapplicable, unjust and unreasonable, unjustly discriminatory, and unduly prejudicial", and to determine Respondent's lawful rates (Respondent's Exhibit 5). Thereupon the District Court, on motion of Petitioner, ordered further proceedings in No. 414 stayed pending action by the Commission on Petitioner's complaint to it.[1]

While Petitioner's complaint to the Interstate Commerce Commission was pending this Court rendered its opinion and judgment in *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464 (1959). It there held that one who has paid charges for transportation by a common carrier by motor computed at rates duly filed with the

[1] It is well settled that the Interstate Commerce Commission has exclusive jurisdiction to determine whether rates filed with it and subject to its regulation meet the criteria for lawfulness contained in Section 216 of the Interstate Commerce Act. See *United States of America* v. *Western Pacific Railroad Co.,* 352 U.S. 59 (1956) and cases there cited.

Interstate Commerce Commission pursuant to Section 217(a) of the Interstate Commerce Act (49 U.S.C. 317(a)) and applicable to the transportation performed has no right to recover any portion thereof, whether or not the rates violated Section 216 of the Act (49 U.S.C. 316), which Section it construed to create administrative criteria for the regulation of rates by the Commission rather than a justiciable legal right to be charged reasonable rates. See 359 U.S. at p. 469.

After the judgment in the *T.I.M.E.* Case became final Respondent filed a motion in No. 414 for judgment on the pleadings grounded on the holding therein. The District Court granted the motion. Petitioner appealed. *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 285 F. 2d 743 (1961). The Court of Appeals stated Petitioner's position on appeal as follows, 285 F. 2d at p. 744:

> "It is the plaintiff's contention in this court that the carrier failed to publish the rates and charges 'fixed' by the Commission, but charged instead rates in excess of those so 'fixed.' The plaintiff thus seeks to distinguish the present case from T.I.M.E., maintaining that in T.I.M.E. the issue was the reasonableness of rates previously filed and not rejected or suspended by the Commission, whereas, here, it is said that the defendant had failed and refused to publish rates and charges which the Interstate Commerce Commission had 'required.'"

Respecting the foregoing contention the Court of Appeals said, 285 F. 2d at pp. 744-745:

> "If, indeed, we could perceive in the earlier proceedings [before the Interstate Commerce Commission] to which our attention has been called,

> (thought they were not made a part of the record), a plain order or orders of the Commission which had the effect of approving certain rates applicable to the shipments here in question, and the defendant's charges were in excess of such rates, the plaintiff might well have a case not falling within the T.I.M.E. ruling. We cannot so adjudicate on this record."

Because of its inability to "so adjudicate" the Court remanded the case to the District Court so that Petitioner might make application for leave to file an amended complaint "alleging facts, if they exist, which might entitle it to relief." 285 F. 2d at p. 745. In so doing the Court said, 285 F. 2d at pp. 745-746:

> "Before leave to amend is granted, the District Court should be satisfied by the plaintiff that the amended complaint will allege and the plaintiff intends to prove that the rates actually charged exceed the applicable *filed* rates; otherwise nothing could be gained by permitting amendment." (Emphasis the Court's).

Petitioner was allowed to file an amended complaint in No. 414 on April 26, 1961. In the meantime, on April 5, 1961 it filed its complaint in No. 523. Both alleged, *inter alia,* that Respondent's rates and charges were maintained in violation of orders of the Interstate Commerce Commission. The cases were consolidated and tried to the Court without a jury on November 22, 1961.

The District Court made the following findings of fact:

> "Plaintiff's amended complaint in No. 414 and its complaint in No. 523 allege, and its evidence in support of both complaints shows: (1) that the

rates at which defendant performed the transportation for plaintiff from New York, New York, to Lynchburg, Virginia, were higher than its rates from New York, New York, to points further therefrom than Lynchburg, Virginia; (2) that under defendant's rates its liability for loss or damage to property in transit was limited to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valuation charge, i.e., a premium over the base rates, of 10 cents per hundred pounds or fraction thereof; (3) that the Interstate Commerce Commission had prior to the performance of the transportation in issue expressed the opinion that rates from New York, New York, to Lynchburg, Virginia, higher than rates from New York, New York, to points further therefrom than Lynchburg were improper, and had admonished carriers maintaining such rates to change them; and (4) that the Commission had prior to the performance of the transportation in issue directed the cancellation of tariff provisions similar to those at which defendant performed the transportation in issue in that they limited the carrier's liability for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless the shipper paid a valuation charge of 10 cents per hundred pounds or fraction thereof.

"Defendant's evidence shows (1) that the rates at which it calculated the freight charges plaintiff paid *were duly filed with the Interstate Commerce Commission pursuant to Section 217(a)* of the Interstate Commerce Act as the applicable rates for the transportation it performed; (2) that the Interstate Commerce Commission had authorized it to file and maintain the tariff provision under which it limited its liability to plaintiff for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was

greater, unless plaintiff paid a valuation charge of 10 cents per hundred pounds or fraction thereof; and (3) that it had in fact filed said provision and in fact maintained it throughout the period during which it performed the transportation in issue. Defendant was not directed by the Commission to cancel this rate until June 2, 1960, long after the transportation of the shipments here in controversy." (App. to Pet. for Cert. pp. 21-23; emphasis the Court's).

Petitioner appealed the District Court's judgment for Respondent to the Court of Appeals for the Fourth Circuit. That Court affirmed the judgment, holding:

"From the evidence presented the District Court found that the challenged freight rates paid by the plaintiff had in fact been duly filed with the I.C.C. as the applicable tariffs for the transportation performed by defendant during the period in question. It also appeared beyond question that while the Commission had criticized these past rates and had admonished the defendant to voluntarily adopt corrective measures, it did not see fit to cancel those rates until new rates were filed on July 2, 1960—after the transportation of the shipments here in question. Concluding that the *T.I.M.E.* decision governed the issues raised, the District Court held that the plaintiff was entitled to no remedy and accordingly dismissed the consolidated actions.

"From an examination of the record as a whole, we are convinced that the District Court's findings are amply supported by the evidence and are clearly correct. The plaintiff asserted that the defendant exacted from it charges greater than those made for similar transportation between more distant points. However, it was shown at the hearing that additional charges were made for the pickup service on the shipments between those points—

charges not imposed on the plaintiff. Thus, it was made affirmatively to appear that the challenged rates from New York to Lynchburg resulted in lower aggregate charges to plaintiff than those cited by it for comparison. Plaintiff's vigorous argument that the *T.I.M.E.* decision is distinguishable is without merit for the reason that the past charges which are attacked as unreasonable were contained in rate schedules duly filed with the Commission and still remaining undisturbed when the charges were made.

"Our conclusion that the plaintiff has failed to carry the burden of proof 'that the rates actually charged exceed the applicable filed rates,' *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, supra, 285 F. 2d at 746, is dispositive of the case, making it unnecessary to consider plaintiff's other contentions." *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 309 F. 2d 678, 679-680 (4th Cir. 1962)

ARGUMENT

Petitioner contended below, as it contends here, that it paid a valuation charge on shipments of dry goods and related articles assessed by Respondent in violation of an order of the Commission.

Petitioner also contended below, as it contends here, that Respondent maintained and assessed for the transportation performed for Petitioner's members for the shorter distance from New York City to Lynchburg, Virginia class rates that were higher than those it maintained for transportation for the longer distances from White Plains, New York and from New York City to Gretna, Virginia through Lynchburg notwithstanding that the Commission had said in 1949 that such rates were *prima facie* unreasonable and admonished Respondent and other carriers to remove such disparities.

Although Petitioner does not argue this issue here, the principles governing its resolution are the same as those governing the issue on the valuation charge. Therefore, our argument treats with it, as did the findings and conclusions of the District Court and the opinion of the Court of Appeals.

Respondent submits that Petitioner's contentions are not supported by, indeed rest on assumptions contrary to, the facts. To quote from the findings of the District Court, "an examination of the reports and orders of the Commission on which plaintiff relies shows no more than that the Commission enunciated therein principles or criteria by which the reasonableness of rates and tariff provisions would be determined, and admonished carriers to follow those principles or criteria in establishing rates and tariff provisions. The Commission neither found that the particular rates and tariff provisions at which defendant's charges to plaintiff were calculated were unreasonable nor ordered defendant to cancel them." (App. to Pet. for Cert. p. 23.)

Addressing itself specifically to the valuation charge, the District Court found:

> "As to the provision in its tariffs by which defendant limited its liability, it is true that in 1951 the Interstate Commerce Commission disapproved and issued an order requiring the cancellation of similar provisions. However, that order *did not* require cancellation of the specific provision in defendant's tariff of which plaintiff complains. Defendant was not ordered to cancel that provision until June 2, 1960, when the Commission issued its report and order on the complaint plaintiff filed simultaneously with, and as part of, its effort to effect the recovery it seeks here. In that

report the Commission declined to consider the reasonableness of the charges plaintiff had paid defendant in the past, i.e., the charges it seeks to recover in these suits, on the authority of the Supreme Court's opinion in *T.I.M.E., Inc., supra.* Hence, the order thereon merely directed defendant to cancel the provision in its tariff limiting its liability or on before August 10, 1960. Defendant complied with that order by filing a supplement to its tariff, which cancelled said provision as of August 10, 1960." (App. to Pet. for Cert. p. 24; emphasis supplied in part).

Addressing itself specifically to the allegation that the class rates from New York to Lynchburg were *prima facie* unjust and unreasonable in that they were higher than the class rates from White Plains and New York City to Gretna, the District Court pointed out that the Commission was aware of this, but was also aware that such disparities were not unusual at points close to the border between two different rate-making territories.[2] It had therefore declined to order the higher rates cancelled or changed, but rather contented itself with admonishing the carriers to take steps to correct such disparities.

---

[2] Lynchburg, Virginia, as well as White Plains, New York and New York, New York are in what is know as Middle Atlantic Territory and the rates between those points are for the most part made collectively by the carriers operating in that Territory through the Middle Atlantic Conference under procedures approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act (49 U.S.C. 5a). Points south of Lynchburg such as Gretna, Virginia and Danville, Virginia are in Southern Territory and the rates between those points and points in Middle Atlantic Territory are for the most part made collectively by the carriers operating between Middle Atlantic Territory and Southern Territory through the Southern Motor Carriers Rate Conference under procedures approved by the Commission under Section 5a.

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Furthermore, to quote from the findings of the District Court, the Commission,

> "in its report on plaintiff's complaint against the specific rates in issue here, which complaint it filed simultaneously with and as a necessary concomitant of its suits here the Commission found that defendant's rates from New York to Lynchburg in fact resulted in lower total charges for such transportation than its total charges for transportation from New York to Gretna or Danville, because the [rates for the] latter transportation, unlike the [rates for the] former, did not include pickup of shipments at New York, for which a separate additional charge was made. Hence, the Commission refused to find defendant's rates from New York to Lynchburg unreasonable and its order did not direct defendant to change them." (App. to Pet. for Cert. p. 24).[3]

The District Court's findings are amply supported by the evidence. Indeed, Petitioner wholly failed to carry the burden the Court of Appeals properly imposed on it when it remanded the case on Petitioner's first appeal, namely "to prove that the rates actually charged exceed the applicable *filed* rates . . ." (285 F. 2d at p. 746; emphasis the Court's). This is clear from the following excerpt from the cross-examination of Petitioner's only witness:

> "Q. Now, do you know whether or not the rates charged by Smith's Transfer Corporation of Staunton, Virginia on the movement of dry goods from New York to Lynchburg during the period

[3] The District Court made no finding whether or not the rates from White Plains were higher to Lynchburg than to Gretna. Whether they were or not is irrelevant because Petitioner's complaint did not allege, nor did Petitioner offer any evidence of any shipments from White Plains.

from January 1, 1953 through June 30, 1960 were rates that were in fact contained in published tariffs filed with the Interstate Commerce Commission and applicable to the transportation performed?

"A. I do not, because I have not checked those rates.

"Q. Do you know what rates were applicable during that period?

"A. I do not at this time.

"Q. Do you know whether or not during that period from January 1, 1953 to June 30, 1960 the applicable rates of Smith's Transfer of Staunton were subject to a valuation charge unless the value were declared and released?

* * * * *

"THE WITNESS: Having not inspected the freight bills, I would not answer that question, I wouldn't know." (Tr. of Evid., pp. 21-22).

As for the Commission's Order of July 27, 1951, upon which Petitioner relies to support its contention that Respondent was without authority to make a valuation charge, there is nothing in it, or in the Commission's report accompanying it, 53 M.C.C. 157, to indicate even that Respondent was one of the carriers to whom the Order was directed, much less that the Commission directed that the particular valuation charges of which Petitioner complains be cancelled. As the findings of the District Court quoted *supra* at pages 9 and 10 correctly state, the Commission did not direct Respondent to cancel the provision in its tariffs for such charges until August 10, 1960. Moreover, the Commission's report accompanying that direction specifically found that Respondent's rates and tariff pro-

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visions in issue there and here had not been shown to be inapplicable as to past shipments, i.e., as to the shipments on which Petitioner seeks recovery here.[4]

CONCLUSION

Petitioner's argument is that the *T.I.M.E.* Case does not bar a shipper from the recovery of damages suffered by reason of a motor carrier's violation of an order of the Commission requiring it to cancel the rates and tariff provisions on the basis of which the shipper's charges for transportation were calculated. But this argument is academic in this case because the factual premise on which it must rest, i.e., the violation of an order of the Commission, is not established by, indeed is contrary to, the facts of record. Since this Court

---

[4] The pertinent language of the Commission in its report is:

"Prior to the institution of this proceeding, an action at law seeking damages for the alleged unlawful rates was brought in the United States District Court for the Western District of Virginia. In view of the decision in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, our determination herein concerning the ratings applied and rates charged on past shipments will be restricted to the issue of applicability. *While it is generally alleged that inapplicable ratings and rates have been and are being applied by Smith, the evidence on this issue is confined to the purported failure to apply a mixing rule on certain shipments.*

* * * * * * *

"We find that the released and penalty ratings of the defendant on articles of clothing and dry goods moving from New York to Lynchburg *are, and for the future will be,* unjust and unreasonable. We further find that the assailed ratings and rates on mixed less-than-truckload shipments of general merchandise from and to the same points *were and are applicable, and are not shown to be unlawful.*"

does not resolve academic questions the Petition for a Writ of Certiorari should be denied.

Respectfully,

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Washington 4, D. C.
Counsel for Respondent

FEB 11 1963
JOHN F. DAVIS, CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term 1962

Case No. 717.

LYNCHBURG TRAFFIC BUREAU (Corp.),
Petitioner,

v.

SMITH'S TRANSFER CORPORATION OF STAUNTON, VA.,
Respondent.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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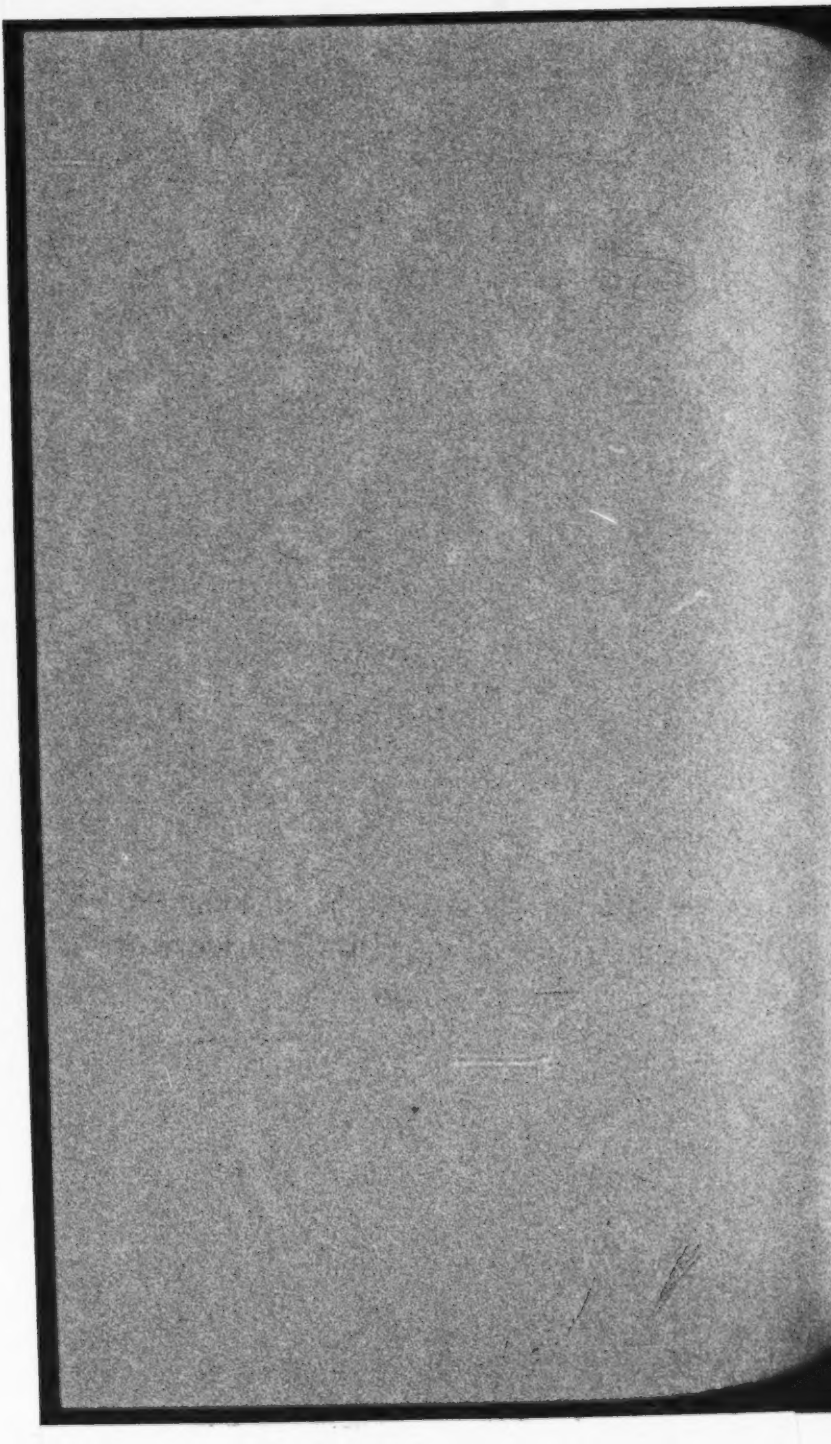

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REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reply of petitioner to Counter Statement of Questions of Respondent

Respondent asserts that the Court found as a fact that petitioner failed to carry its burden of proving that respondent had violated any order of the Commission and that the rates and charges assessed by respondent had been found by the Commission to be unjustly or unreasonably high.

The District Court, in its findings, of fact, stated:

> "Plaintiff's amended complaint in No. 414 and its complaint in No. 523 allege, and *its evidence in support of both complaints shows*: (1) that the rates at

which defendant performed the transportation for plaintiff from New York, New York, to Lynchburg, Virginia, were higher than its rates from New York, New York, to points further therefrom than Lynchburg, Virginia; (2) that under defendant's rates its liability for loss or damage to property in transit was limited to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valuation charge, i.e., a premium over the base rates, of 10 cents per hundred pounds or fraction thereof; (3) that the Interstate Commerce Commission had prior to the performance of the transportation in issue expressed the opinion that rates from New York, New York, to Lynchburg, Virginia, higher than rates from New York, New York, to points further therefrom than Lynchburg were improper and had admonished carriers maintaining such rates to change them; and (4) that the Commission had prior to the performance of the transportation in issue directed the cancellation of tariff provisions similar to those at which defendant performed the transportation in issue in that they limited the carrier's liability for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless the shipper paid a valuation charge of 10 cents per hundred pounds or fraction thereof."

It is clear that the Court did find that the Commission did direct, prior to the performance of the transportation service, the cancellation of the valuation charge, which charge is the subject of this suit. These findings support all questions raised by petitioner and since the District Court felt bound by the decision in the T I M E Case, there still remains for decision by this Honorable Court the question of a shipper's right to redress under the

Motor Carrier Act for charging rates contrary to an order and decision of the Interstate Commerce Commission. The transcript of record, which record is in the files of the Court of Appeals, shows that the respondent was given the privilege of preparing for the District Court the findings of fact and conclusions of law so as to make those findings conform to the decision of the Court holding that the decision in the T I M E CASE controlled. This conclusion is borne out by the record, as follows:

> "The Court: All right, evidence on the part of the defendant is all in and the time now comes for the decision in the case, which raises your question of the motion to dismiss so I will hear from the plaintiff. (Whereupon the Court heard arguments by counsel for both sides).
>
> "The Court: As it may appear from what I have said, I am satisfied that the judgment must go for the defendant. I don't think the plaintiff has made any better case than what was before me when I granted the defendant's motion for judgment on the (tr. 52) pleadings or summary judgment, I believe it was, a year or more ago. It is quite true, as mentioned in Judge Sobeloff's opinion, that the Commission has had some pretty harsh things to say about some rates that are involved here and admonished the carriers to do certain things. But the rates which were in effect, the final rates from which the carrier is not permitted to deviate, continue to be the rates which were charged by Smith's Transfer Corporation throughout the period in controversy and I still believe that the T I M E Case covers this situation like a blanket and *that I have no alternative but to order judgment for the defendant,* which I will do.

> "This case hasn't actually been heard and tried on the merits. The Court is required to file findings of fact and conclusions of law and you have to support the judgment in your favor, Mr. Rea, and I think I should give you the privilege of giving you a chance to submit proposed findings of fact and conclusions of law" (tr. 53).

These remarks clearly show that the Court did not decide this case on the evidence of the record because the Court felt that it was bound by the decision in the T I M E Case and that the findings of fact are those suggested by respondent. The findings of fact, as to respondent, are self-serving.

The facts of record and conclusions of the lower Courts that they were bound by the decision of the Supreme Court in T I M E v. U. S., 359 U. S. 464, present special and important reasons for this Honorable Court to grant the petition and to pass upon the questions presented by petitioner at page 3 of its petition for writ of certiorari.

REPLY TO COUNTER STATEMENT OF THE CASE OF RESPONDENT

The record contained a copy of the decision of the Interstate Commerce Commission in Dry Goods, Piece Goods, Dependent Upon Value, 53 M.C.C. 1957, and that decision speaks as follows:

> "In No. MC-C-1019 by complaint filed January 13, 1949, the above specified protestants, except the one named last, alleges that the ratings when based upon released value, and the penalty ratings, when no value is declared, on piece goods and knit goods of rayon and rayon mixed with cotton, and on *dry goods,*

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> finished or unfinished, except when made wholly of cotton, between points in Middle Atlantic territory maintained by defendants motor common carriers *members of the Conference* (including respondent) are unjust and unreasonable in violation of Section 216 of the Interstate Commerce Act. Complainants seek an order requiring defendants to establish reasonable ratings, rules and regulations for the future" (Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157(158), decided by the Interstate Commerce Commission on July 27, 1951). (Emphasis added.)

In the above Dry Goods Case supra, the Interstate Commerce Commission, at page 173, said:

> "In No. MC-C-1019, we find that the assailed ratings and provision are, and for the future will be, unjust and unreasonable. An order will be entered requiring defendants (Smith's Transfer) to cancel the assailed ratings and closing the proceeding."

The record in the District Court further shows that the Interstate Commerce Commission did issue an order on July 27, 1951 (see plaintiff's Exhibit 4) which, in part, is as follows:

> "It is Ordered: That the defendants (including respondent) in No. MC-C-1019 be and they are hereby, notified and required to cancel the assailed rates and provisions, on or before September 10, 1951, upon not less than one day's posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act."

It is definitely clear from the record that petitioner

did prove that respondent was under an order of the Commission in 1951 to cancel the valuation charge from the tariff of respondent. Respondent did not, in 1951, comply with that order and proof of that fact is found in this suit as petitioner is seeking to recover from respondent damage for collecting charges in violation of an order of the Commission. The question is: Can petitioner recover damage from respondent for failing to comply with an order of the Interstate Commerce Commission?

The District Court, in its findings of fact stated:

> "The evidence shows that the rates at which defendant performed the transportation for plaintiff from New York to Lynchburg, Va. were higher than the rates from New York to points further therefrom than Lynchburg."

The report of the Interstate Commerce Commission in Lynchburg Traffic Bureau v. Smith's Transfer Corporation, 310 I.C.C. 503, to which reference has been made, shows that Smith's Transfer, through its connections, participates in through routes and joint rates from White Plains, N. Y. through New York, N. Y. and Lynchburg, Va. to Gretna (504) and that Lynchburg is 38 miles north of Gretna and is an intermediate point to Gretna on U. S. Highway 29 (504). Then, the report shows that rate on shipments of less than 2,000 pounds from New York to Lynchburg here assailed, is 351 cents as compared with rate from New York, N. Y. and White Plains, N. Y. of 334 cents to Gretna (506).

The report of the Commission, which report is before the Court by judicial notice and copy thereof was filed with the Courts below, shows that the rate from White Plains,

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N. Y. to Gretna, Va., through New York, N. Y. and Lynchburg, is 334 cents per 100 pounds, and from New York, N. Y. to Lynchburg the rate is 351 cents. Therefore, higher charges are assessed at Lynchburg, an intermediate point, than are assessed at more distant points (such as White Plains to Gretna).

In instances, such as the one existing from White Plains to Gretna versus from New York, N. Y. to Lynchburg, the higher rate to Lynchburg is prima facie unreasonable, as a matter of law, regardless of statutory enactment, as this Honorable Court said, in Patterson v. L&N, 269 U.S. 1(11):

> "Apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul."

Respondent makes the assertion that "as to the Commission's order of July 27, 1951, rendered as a result of the decision in the Dry Goods Case, 53 M.C.C. 157, that respondent was not one of the carriers to whom the order was directed." This statement is wholly untrue from the record and from testimony of the witness for respondent. The respondent's witness, at page 28 of the transcript of record, stated that "Smith's Transfer Corporation of Staunton, Virginia, is a member of the Middle Atlantic Conference and it is the Agent of Smith's Transfer Corporation of Staunton." Then, the respondent introduced Defendant's Exhibit No. 4 to show that in 1952 the Middle Atlantic Conference was the agent for Smith's Transfer. Nowhere in the record, prior to this time, has respondent denied that it was bound by the order of the Commission but rather that it sought to comply with the order and introduced an exhibit in the former case to that

effect. The record shows that the complaint in the Dry Goods Case was directed to members of the Middle Atlantic Conference and since Smith's Transfer Corporation is a member of the Middle Atlantic Conference, the order was also directed against them. Moreover, as agent for Smith's Transfer Corporation, the Conference should have canceled out the valuation charge prior to 1953 when the shipments of petitioner began to move. Its agent, the Middle Atlantic Conference, knew, if Smith's Transfer Corporation was not a member of the Conference in 1949, that Smith's upon becoming a member of the Conference automatically became bound by the order of the Commission requiring the cancellation of the valuation charge.

ARGUMENT

Petitioner believes that the facts of record and the findings of the Court establish the facts, when the applicable law is applied thereto, that the respondent has collected charges from petitioner which are contrary to an order of the Interstate Commerce Commission (Plaintiff's Exhibit No. 4); contrary to rates and charges the Commission fixed in 1951 for future application on dry goods in 53 M.C.C. 157; and charged rates which are higher at Lynchburg from New York to Lynchburg than the rates are from White Plains, N. Y. to Gretna, Va., through New York and Lynchburg, contrary to decisions of the Commission holding that higher rates at intermediate points are prima facie unjust and unreasonable and the holding of this Court in Patterson v. L&N, 269 U.S. 1(11), that apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul.

The record made in the District Court, when reviewed upon the petition for writ of certiorari, will disclose,

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petitioner believes, that the questions involved in this case are substantial and are of great importance in determining the rights of shippers under the Motor Carrier Act when the Interstate Commerce Commission finds a rate or charge unreasonable and shipments subsequently move at the rate found unreasonable or move at charges contrary to an order of the Interstate Commerce Commission. The record shows that on petitioner's shipments moving on the valuation charge, that the Interstate Commerce Commission granted relief for the future but denied reparation under the decision of this Honorable Court in T I M E v. U. S., 359 U. S. 464, and that the Federal Courts have denied relief under the same decision. The facts in this case are distinguishable from those in the T I M E Case and relief should be granted, as granting the relief will be in furtherance of the legislative scheme of regulation (see Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 9 L ed 142).

CONCLUSION

Petitioner again respectfully represents that the questions involved herein are of great importance and are such as to warrant the granting of this petition and that the questions raised herein be resolved by this Honorable Court.

Petitioner, therefore, respectfully prays that the petition be granted.

W. G. BURNETTE,
Attorney for Petitioner

W. G. BURNETTE
1017 Church Street
Lynchburg, Virginia

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Petitioner, hereby certify that I have this 11th day of February, 1963, served a copy of the foregoing document upon the respondent by mailing a copy thereof to Bryce Rea, Jr., 919 Munsey Building, Washington 4, D. C., counsel for Respondent.

W. G. BURNETTE.

MAR 2 6 1963
JOHN F. DAVIS, CLERK

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1962

Case No. 717.

LYNCHBURG TRAFFIC BUREAU (Corp.),
Petitioner,

v.

SMITH'S TRANSFER CORPORATION
OF STAUNTON, VA.,
Respondent.

PETITION OF PETITIONER FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

W. G. BURNETTE,
Lynchburg, Virginia.
Counsel

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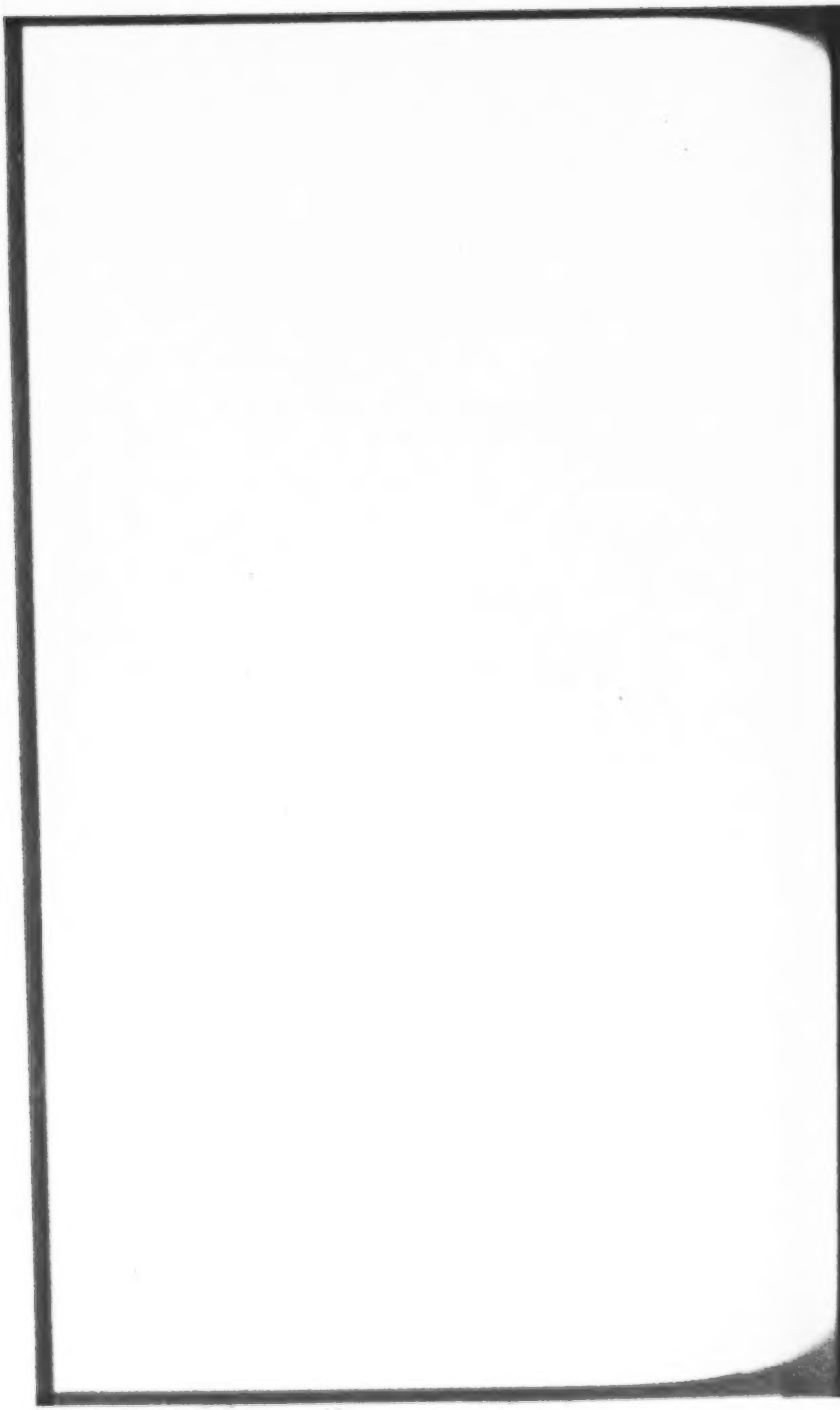

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STATEMENT

Petitioner, in support of this petition for rehearing respectfully directs attention to the statutory provisions allowing petitioner the right to have an order of the Interstate Commerce Commission enforced and allowing petitioner the right to recover damage for the failure of respondent to obey such an order of the Commission.

Back in 1958, when the complaint was filed with the

Interstate Commerce Commission seeking a determination of lawful charges and when action was instituted in the District Court to recover damages for the exaction of unlawful rates and charges, the law and practice was to first institute suit in the District Court for damage and then to file a formal complaint with the Interstate Commerce Commission for determination of lawful rates and charges. After the Commission had determined past unlawfulness, then petitioner was to pursue the action in Court for damage.

After both the action in Court and the complaint before the Commission were filed and before the Commission rendered its decision in the complaint case, this Honorable Court, by the decision in the T I M E Case, 359 U.S. 464, changed the whole scheme of relief heretofore adopted and, for that reason, the complaint case before the Commission was not decided, as the Commission said:

> "In view of the decision in T I M E, Inc. v. United States, 359 U.S. 464, our determination herein concerning the ratings applied and rates charges on past shipments will be restricted to the issues of applicability" (See Lynchburg Traffic Bureau v. Smith's Transfer Corporation of Staunton, Va., 301 I.C.C. 503(504)).

Almost immediately after the T I M E decision was released, respondent filed a motion to dismiss this action in light of that decision. The motion was sustained and from that day to the present day, the issue of the right of petitioner to have the order of the Interstate Commerce Commission in 53 M.C.C. 157 enforced and damages awarded have never been determined and that right is

what petitioner is here seeking to have granted. The Interstate Commerce Commission, in speaking of whether or not the Commission found the valuation charge unjust and unreasonable and issued an order requiring respondent to cancel the aforesaid valuation charge, said:

> "In 1951, released ratings and penalty ratings on dry goods, finished or unfinished, * were considered in Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157. Therein, Division 3 found released ratings and penalty ratings on such traffic moving between points in Middle Atlantic Territory * unjust and unreasonable and their cancellation was required" Lynchburg Traffic Bureau v. Smith, 310 I.C.C. 503(505).

It is thus clear that the valuation charge was declared, in 1951, to be unjust and unreasonable and respondent was required by an order of the Interstate Commerce Commission to cancel the aforesaid valuation charge. Respondent did not comply with that order but collected from petitioner those unlawful charges.

WAS AN ORDER ISSUED?

The first thing to determine is whether or not the Interstate Commerce Commission, in 1951, issued an order requiring respondent to cancel from its tariffs a provision imposing a valuation charge[1] on shipments of dry goods

[1] A valuation charge is a charge respondent imposes over and above the regular rate and charge made for releasing the liability of respondent in case of loss or damage to shipments of dry goods and clothing to the value declared. The valuation charge on petitioner's shipments was equal to 20 cents per 100 pounds.

and clothing, and if the order was issued and not complied with, what rights, if any, did petitioner have under statutory provisions.

The order was issued, as the Interstate Commerce Commission on July 27, 1951, issued an order requiring respondent to cancel the said valuation charge from its tariff. The order, in part, read:

> "It is ordered, that the defendants (including Smith) in MC-C-1019 be, and they are hereby, notified and required to cancel the assailed ratings and provisions (on dry goods and clothing authorizing a valuation charge) on or before September 10, 1951" (see Plaintiff's Exhibit E which was reproduced in brief to Court of Appeals and in Appendix to this Court).

The respondent did not comply with that order and proof of that fact is found in the complaint in this suit. The fact that petitioner is here seeking to recover the charges which respondent collected from petitioner contrary to an order of the Commission is proof that respondent did not comply with the order.

WHICH CONTROLS? THE STATUTORY PROVISION OR THE DECISION IN THE T I M E CASE?

The next question is: does the T I M E Case prevent recovery of the valuation charges which respondent collected contrary to a decision and order the Interstate Commerce Commission rendered in Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157, or do statutory provisions give petitioner a cause of action to have the afore-

said order enforced and the right to damages as it relates to the shipments of dry goods and clothing moving from 1953 to 1960 on which a valuation charge was collected by respondent contrary to an order of the Interstate Commerce Commission? Your petitioner reads the statutes as allowing petitioner the right to have the order enforced and to recover damage from respondent for disobedience by respondent to an order of the Interstate Commerce Commission.

In support of that belief, your petitioner states that, it is provided in 49 U.S.C. 305(g), as follows:

> "Any final order made under this part (Motor Carrier Act and the Act under which the order and decision in 53 M.C.C. 157 were made) shall be subject to the *same right of relief in court* as it is now provided in respect to orders of the Commission made under Part I."

Part I is the Rail Carrier Act and Section 8 of 49 U.S.C. provides that petitioner is entitled to damages for the failure of respondent to comply with any provisions of Part I and under Section 16(12), 49 U.S.C. (Part I), compliance is required with the order the Commission issued requiring the cancellation in 1951 of the valuation charge. Petitioner has the right, under Section 16(12) of the Rail Carrier Act, 49 U.S.C., to apply to the District Court for enforcement of the order requiring the cancellation of the valuation charge and the neglect of the respondent to comply with the order the Commission entered in the Dry Goods Case, 53 M.C.C. 157 entitles petitioner to relief. Section 16(12) of 49 U.S.C. specifically provides that petitioner is entitled to relief as it provides that failure of a carrier to obey any order of the Commission, except

for payment of money, that "any party injued thereby may apply to any district court of the United States * for the enforcement of such order."

Had petitioner filed two separate actions in the District Court, one for enforcement of an order of the Commission and the other for damages for exacting higher rates at Lynchburg than at more distant points, then the T I M E Case would not have affected the action for enforcement of an order of the Interstate Commerce Commission.

Section 1336 of 28 U.S.C. provides that the district court shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend in whole or part any order of the Interstate Commerce Commission. This section allows petitioner to enforce the order the Interstate Commerce Commission entered in the Dry Goods Case, 53 M.C.C. 157 and that fact clearly shows that the T I M E Case is not controlling, which latter case the District Court used to deny relief to petitioner, which relief arises under the order of the Commission requiring cancellation of the valuation charge. The Court of Appeals affirmed the judgment of the District Court. This petition is directed solely to the issue of whether or not enforcement of an order of the Interstate Commerce Commission can be had and relief granted as provided in 49 U.S.C. 8, 49 U.S.C. 305(g) and 49 U.S.C. 16(12).

Petitioner believes that a denial of the petition for writ of certiorari will be tantamount to granting respondent the right to exact and keep for itself known unlawful charges, contrary to law and to a decision and order or the Interstate Commerce Commission finding, in 1951, the valuation charge on dry goods and clothing unjust and unreason-

able for application on shipments moving subsequent thereto and entered an order requiring respondent to cancel, in 1951, the valuation charge. Had respondent complied complied with the decision and order of the Interstate Commerce Commission in 53 M.C.C. 157, petitioner would not have been damaged, as the valuation charge would not have been exacted.

WHEREFORE, petitioner respectfully prays that the writ of certiorari be granted as sought.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU

By: W. G. BURNETTE,
Counsel

CERTIFICATE OF COUNSEL

I, W. G. Burnette, counsel for petitioner, hereby certify that the petition for rehearing is presented in good faith and not for delay. Counsel further avers that the petition is restricted to the grounds above specified.

W. G. BURNETTE

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Petitioner, hereby certify that I have this 24 day of March, 1963, served a copy of the foregoing document upon the respondent by mailing a copy thereof to Bryce Rea, Jr., 919 Munsey Building, Washington 4, D. C., counsel for Respondent.

W. G. BURNETTE